Office - Supreme Court, U.S.
FILED
JUN 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 195 7

No. ~~1117~~ 217

MORRIS W. ZACK and SARAH ZACK,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES L. LEVIN,
Attorney for Petitioners,
1250 Penobscot Building,
Detroit 26, Michigan.

Of Counsel:
MORRIS GARVETT,
1250 Penobscot Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26 Michigan

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2-3
I. Scope of judicial review	2
II. Application of clear error rule	3
III. Imputation of activity of co-owner of property to another co-owner	3
IV. Capital asset definition	3
Statutes Involved	4
Statement	4-6
Reasons for Granting the Writ	7-28
I. Does the clearly erroneous rule prevent judicial review, as a question of law, of the Trial Court's determination of whether property is a capital asset?	7-13
Sixth Circuit	8-9
Ninth Circuit	9
Tenth Circuit	10
Third Circuit	10
Fifth Circuit	11
Seventh Circuit	11-13
II. Is the function of the Court of Appeals discharged when it finds that there is substantial evidence to support the Trial Court's findings, in a case where the judges who made the findings did not have the opportunity either to see or hear the witnesses?	13-16

Page

III. May the activities of an owner of an undivided interest in property be imputed to the owner of another undivided interest thereof, in the determination of the question of whether property was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business?..... 16-19

IV. Were bomb hoists (designed for raising and lowering bombs to and from military aircraft) for which there was no market or customer at the time of purchase, and which were purchased by the petitioners as a speculation, and sold at a price over seven times their cost more than two years later, after a demand therefor had arisen following the outbreak of hostilities in Korea, capital assets; the petitioners neither having hired any salesmen nor solicited any customer at any time, nor advertised the bomb hoists and the whole transaction being unique in the life of the petitioners?..... 19-28

Conclusion 28

Appendix A:

Internal Revenue Code of 1939, Sec. 117..... 1a

Internal Revenue Code of 1954, Sec. 7482..... 2a

Federal Rules of Civil Procedure, Rule 52.... 2a

Revised Rules of the United States Court of Appeals for the Sixth Circuit, Rule 22..... 3a

Appendix B:

Orders entered in the United States Court of Appeals for the Sixth Circuit..... 5a-6a

Opinion of the Tax Court of the United States 7a-15a

INDEX TO AUTHORITIES CITED

	Page
Baumgartner v. United States, 322 U. S. 665 (1944)	12
Beck v. Commissioner, 7th Cir., 179 F. 2d 688 (1950)	23
Camp v. Murray, 4th Cir., 226 F. 2d 931 (1955)	17, 21
Chandler v. United States, 7th Cir., 226 F. 2d 403 (1955)	11, 21
Cohn v. Commissioner, 9th Cir., 226 F. 2d 22 (1955)	9
Commissioner v. P. G. Lake, Inc., 5th Cir., 241 F. 2d 71 (1957)	13, 28
Consolidated Naval Stores Co. v. Fahs, 5th Cir., 227 F. 2d 923 (1955)	11
Corn Products Refining Co. v. Commissioner, 350 U. S. 46 (1956)	12-13
Curtis Co. v. Commissioner, 3rd Cir., 232 F. 2d 167 (1956)	10
Di Lisio v. Vidal, 10th Cir., 233 F. 2d 909 (1956)	10
Dillon v. Commissioner, 8th Cir., 213 F. 2d 218 (1954)	17
Dougherty v. Commissioner, 6th Cir., 216 F. 2d 110 (1954)	8
Dunitz v. Commissioner, 6th Cir., 167 F. 2d 223 (1948)	24
Harry Dunitz, 7 T. C. 672, 684	24
Dunlap v. Oldham Lumber Co., 5th Cir., 178 F. 2d 781 (1950)	22
Fahs v. Crawford, 5th Cir., 161 F. 2d 315 (1947)	21
Faroll v. Jarecki, 7th Cir., 231 F. 2d 281 (1956)	11, 26
Federal Rules of Civil Procedure, Rule 52 (a)	7, 11
Fidler v. Commissioner, 9th Cir., 231 F. 2d 138 (1956)	17, 23
James F. Fidler, 20 T. C. 1081 (1953)	24
Friend v. Commissioner, 10th Cir., 198 F. 2d 285 (1952)	10

Page

Galena Oaks Corporation v. Scofield, 5th Cir., 218 F. 2d 217 (1954) 11

Gamble v. Commissioner, 5th Cir., 242 F. 2d 586 (1957) 11

Goldberg v. Commissioner, 5th Cir., 223 F. 2d 709 (1955) 11, 19

Nathan D. Goldberg, 22 T. C. 533 (1954) 19

Greenspon v. Commissioner, 8th Cir., 229 F. 2d 947, 951 (1956) 18, 19

Louis Greenspon, 23 T. C. 138 (1954) 19

Harry Slatkin Builders, Inc. v. Commissioner, 6th Cir., 235 F. 2d 189 (1956) 8

Helvering v. Tex-Penn Oil Co., 300 U. S. 481 (1937) 12

Home Co., Inc. v. Commissioner, 10th Cir., 212 F. 2d 637 (1954) 19

Internal Revenue Regulation 111, Sec. 29.117-1 24

George R. Kennon, 16 T. C. 1026, 1032 (1951) 26

Miller v. Commissioner, 6th Cir., 183 F. 2d 246 (1950) 14

Orvis v. Higgins, 2nd Cir., 180 F. 2d 537 (1950) 15

Philber Equipment Corporation v. Commissioner, 3rd Cir., 237 F. 2d 129 (1956) 10; 17, 19

Philber Equipment Corporation, 25 T. C. 88 (1955) 19

Phipps v. Commissioner, 2nd Cir., 54 F. 2d 469 (1931) 17, 23

Frank B. Polacheck, 22 T. C. 858, 862 (1954) 26

Reynolds v. Commissioner, 1st Cir., 155 F. 2d 620 (1946) 17, 24-25

Ross v. Commissioner, 5th Cir., 227 F. 2d 265, 267 (1955) 17

Schafer v. Helvering, Ct. App. C. C. 83 F. 2d 317, 319 (1936), aff'd 299 U. S. 171, 174 (1936) 26

Shepherd v. United States, 6th Cir., 231 F. 2d 445 (1956) 9

	Page
Smith v. Commissioner, 232 F. 2d 142, 143 (1956)	11, 22
Smith v. Dunn, 5th Cir., 224 F. 2d 353 (1955)	17, 18
Stockton Harbor Industrial Co. v. Commissioner, 9th Cir., 216 F. 2d 638 (1954)	9
United States v. C. R. Bondurant, 6th Cir., — F. 2d — (decided May 24, 1957, 1957 Commerce Clearing House Federal Tax Reports, par. 9689)	9
United States v. O'Neill, 9th Cir., 211 F. 2d 701 (1954)	9
United States v. United States Gypsum Co., 333 U. S. 364 (1948)	14
Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474 (1951)	16
Thomas E. Wood, 16 T. C. 213, 219(1951)	26
512 West Fifty-Sixth Street Corporation v. Commissioner, 2nd Cir., 151 F. 2d 942 (1945)	23
Weyl-Zuckerman & Co. v. Commissioner, 9th Cir., 232 F. 2d 214 (1956)	9

IN THE

Supreme Court of the United States

OCTOBER TERM 195....

No. .....

MORRIS W. ZACK and SARAH ZACK,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Morris W. Zack and Sarah Zack pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The Opinion of the Tax Court is reported at 25 T. C. 676, and a copy of its Opinion, one judge dissenting, is printed in Appendix B hereto, *infra*, pages 7a-15a. The Court of Appeals did not file an Opinion in this case, and a copy of its order, one judge dissenting, is printed in Appendix B hereto, *infra*, page 5a. The Court of Appeals' Order has not been officially reported.

JURISDICTION

The Order of the Court of Appeals affirming the decision of the Tax Court was filed on February 19, 1957. The Petitioners filed a Petition for Rehearing with the Court of Appeals within the twenty day period permitted for filing same provided under Rule 22 of the Rules of the United State Court of Appeals for the Sixth Circuit. The Petition for Rehearing was denied by Order entered on March 26, 1957, and a copy of the Order is printed in Appendix B hereto, *infra*, page 6a. The jurisdiction of this Court is invoked under Sec. 7482 of the Internal Revenue Code of 1954 and Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Four separate questions are presented for review:

I.

Scope of judicial review

Does the clearly erroneous rule prevent judicial review, as a question of law, of the trial court's determination of whether property is a capital asset?

II.

Application of clear error rule

Is the function of the Court of Appeals discharged when it finds that there is substantial evidence to support the trial court's findings, in a case where the judges who made the findings did not have the opportunity either to see or hear the witnesses?

III.

Imputation of activity of co-owner of property to another co-owner

May the activities of an owner of an undivided interest in property be imputed to the owner of another undivided interest thereof, in the determination of the question of whether property was held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business?

IV.

Capital asset definition

Were bomb hoists (designed for raising and lowering bombs to and from military aircraft) for which there was no market or customer at the time of purchase, and which were purchased by the Petitioners as a speculation, and sold at a price over seven times their cost more than two years later, after a demand therefor had arisen following the outbreak of hostilities in Korea, capital assets; the Petitioners neither having hired any salesmen, nor solicited any customer at any time, nor advertised the bomb hoists and the whole transaction being unique in the life of the Petitioners?

STATUTES INVOLVED

The pertinent statutory provisions are Section 117 of the Internal Revenue Code of 1939, page 50 of Vol. 53 part 1, U. S. Statutes at Large, and Section 7482 of the Internal Revenue Code of 1954, page 890 of Vol. 68A U. S. Statutes at Large. The pertinent statutory provisions are printed in Appendix A, *infra*, pages 1a-3a.

STATEMENT

(The references in parentheses are to pages of appellant's printed appendix filed with the Court of Appeals, unless otherwise indicated. Nine copies of the printed appendix have been furnished to the Clerk of this Court.)

The basis of the jurisdiction of the court of first instance, The Tax Court of the United States, was a petition filed by the Petitioners pursuant to Section 272 of the Internal Revenue Code of 1939, for a redetermination of deficiencies asserted by the Commissioner of Internal Revnue for the calendar year 1950.

The case with respect to the questions is as follows:

In March, 1948, one Sam Breakstone, of Cleveland, Ohio, entered into an agreement for the purchase of approximately 1565 bomb hoists. He made an initial payment of $1,000, and agreed to make additional payments at varying intervals and to complete payment within 90 days (3a, 10a).

A bomb hoist is a device for the lifting of a bomb into a military bombing plane (26a, 27a). It is an intricate electrical mechanism (10a). The bomb hoists had been manufactured for use by the armed forces, and were declared surplus at the conclusion of World War II (4a).

Breakstone soon discovered that he would not be able to pay for the bomb hoists within the time limited by his contract. He thereupon communicated with one Joseph

Tyroler of Cleveland, Ohio, and attempted to interest him in the purchase of the bomb hoists (46a). Tyroler telephoned the Petitioner, Morris W. Zack (hereafter the "Petitioner"), in Detroit, Michigan, and told him about Breakstone's deal; that Breakstone did not have the money to complete his purchase and that while the bomb hoists cost $330 each to build, they could be purchased for $15 each (26a).

The following day, April 13, 1948, Breakstone and Tyroler came to Detroit to meet the Petitioner, and a written instrument was signed by the three of them under which Tyroler and the Petitioner agreed to pay the balance of the purchase price for the bomb hoists, and it was agreed that the profits would be shared equally[1] (12a, 26a).

Tyroler thereupon consummated the purchase (13a, 28a). 1499 bomb hoists were actually received (5a), of which 1483 were eventually sold and 16 were abandoned (7a).

Petitioner is the president of a corporation which deals in nonferrous metals such as copper, brass, aluminum, and zinc, as raw materials, which can readily be resold because of an ever-present market for such materials (25a, 30a, 40a). It does not buy or sell finished products (30a, 31a). None of the customers of the petitioner's corporation were potential purchasers of the bomb hoists, as the bomb hoist is an intricate manufactured product. No bomb hoists were at any time offered or sold to any of them, or to any purchaser obtained by Petitioner (Tax Court findings, *infra*, page 11a).

---

[1] It was also agreed that Petitioner's interest would be shared by the Petitioner's two sons and son-in-law. One of the Commissioner's contentions was that the share of the gain from the sale of the bomb hoists reported as the income of his two sons and son-in-law was the income of the Petitioner. The Tax Court rejected this contention, and the Commissioner withdrew an appeal therefrom.

Shortly after Tyroler and the Petitioner acquired an interest in the bomb hoists, 4 were sold on June 18, 1948, by Breakstone to Gimbel Brothers as a sample (5a, 56a). No further sale of bomb hoists was made until 19 months later when, on February 15, 1950, one of the original manufacturers of some of the bomb hoists—who knew where they were located (56a)—purchased 4 of them and took an option for 200 more (5a, 32a). It did not exercise its option (17a).

Hostilities in Korea broke out on June 25, 1950. Over six months after the sale of 4 bomb hoists under the option that was not exercised, 200 bomb hoists were sold to one purchaser through Tyroler, on September 8, 1950 (6a, 17a). Three days later, 1275 bomb hoists were sold to one purchaser (6a, 18a).

The Tax Court found that the Petitioner never solicited anyone to buy a bomb hoist (page 11a, *infra*). The dissenting judge who alone among the Tax Court judges, heard and saw the witnesses, observed: "* * * a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind." He also found "There was no market for the bomb hoists involved. They were designed and useful only for the specific purpose of hoisting bombs into the bomb bay of military aircraft" (page 15 *infra*).

The Court of Appeals, one judge dissenting, affirmed without filing a formal opinion. The order stated that "* * * it appearing that the findings of fact, *opinion* and *decision* of the Tax Court were not clearly erroneous", that its decision was "* * * affirmed, in accordance with the findings of fact and opinion of the Tax Court," (page 5a *infra*) (Italics added).

The dissenting judge dissented "* * * for the reasons expressed in Judge Withey's dissenting opinion in the Tax Court."

REASONS FOR GRANTING THE WRIT

The reasons why, in the opinion of Petitioners, a Writ of Certiorari should be granted are discussed separately under the headings of the questions.

I.

DOES THE CLEARLY ERRONEOUS RULE PREVENT JUDICIAL REVIEW, AS A QUESTION OF LAW, OF THE TRIAL COURT'S DETERMINATION OF WHETHER PROPERTY IS A CAPITAL ASSET?

The Sixth Circuit has, in a series of recent opinions, held that the question of whether property is a capital asset, is one of fact, and that its powers of review are restricted by the "clear error" rule. (Citations hereinbelow).

The Sixth Circuit's first such rulings were expressly rested on prior holdings to like effect by the Courts of Appeal of the Ninth and Tenth Circuits. These rulings of the Sixth, Ninth and Tenth Circuits are in direct conflict with rulings of the Courts of Appeal for the Third, Fifth and Seventh Circuits which hold that the question is one of "ultimate fact", subject to review free from the restraining impact of the "clear error" rule.

Rule 52 (a) of the Federal Rules of Civil Procedure provides that findings of fact shall not be set aside unless "clearly erroneous", and that rule is applicable to the findings of fact of the Tax Court (Section 7482 (a) of the Internal Revenue Code of 1954). The power of the Court of Appeals to review questions of law is not, however, so restricted. Section 7482 (c)(1) provides that the Court of Appeals may modify or reverse the decision of the Tax Court if it "is not in accordance with law."

It is, of course, of primary importance that the Courts of Appeal of the several circuits apply the same standard when approaching the same question. It is just as important that the appellate courts fully exercise their powers of review as it is that they do not exceed the powers granted to them. To review is, of course, the very function of the Courts of Appeal. It is respectfully submitted that the Sixth, Ninth and Tenth Circuits have taken an unduly restricted view of their powers of review, resulting in a failure properly to consider the questions of law inherent in the capital gain and loss cases.

The great diversity in the decisions of the several circuits in capital gain and loss cases is, no doubt, in part attributable to the expressed difference as to the degree of restraint that the Courts of Appeal should exercise in reviewing these cases. A ruling by the Supreme Court as to the correct standard of review would, no doubt, aid in bringing about uniformity of decision. All of the decisions cited below of the Courts of Appeal on this matter were decided within the last five years. It is respectfully submitted that the matter is now ripe for review.

The following is a brief summary of the statements in capital asset cases of the Courts of Appeal of the Sixth, Ninth and Tenth Circuits on the question, following which we will present a brief summary of the statements in capital asset cases of the Courts of Appeal of the Third, Fifth and Seventh Circuits with regard thereto.

Sixth Circuit

Dougherty v. Commissioner, 6th Cir., 216 F. 2d 110 (1954) "* * * essentially a question of fact. * * *"

Harry Slatkin Builders Inc. v. Commissioner, 6th Cir., 235 F. 2d 189 (1956) "* * * a question of fact * * *" Certiorari denied 352 U. S. 928.

Shepherd v. United States, 6th Cir., 231 F. 2d 445 (1956) "* * * this question is primarily a question of fact * * *".

United States v. C. R. Boudarant, 6th Cir., ... F. 2d .... (decided May 24, 1957, 1957 Commerce Clearing House Federal Tax Reports, Paragraph 9689) — "Whether they are actually capital assets, be they cotton, lard, oats or any other commodity, is a question of fact, depending upon all the facts in the case, including intention and good faith."

Ninth Circuit

Stockton Harbor Industrial Company v. Commissioner, 9th Cir., 216 F. 2d 638 (1954) — "What is and what is not trade or business and when property is or is not held for sale to customers are questions of fact." (at page 650) Accord: *United States v. O'Neill*, 9th Cir., 211 F. 2d 701 (1954); *Cohn v. Commissioner*, 9th Cir., 226 F. 2d 22 (1955).

Weyl-Zuckerman & Company v. Commissioner, 9th Cir., 232 F. 2d 214 (1956) — While this was not a capital asset case, the holding of the Court of Appeals in this tax case is of significance since it is directly opposed to that of the holdings of the Third Circuit in *Philber Equipment Corporation v. Commissioner, infra*, and of the Fifth Circuit in *Gamble v. Commissioner, infra*. The Ninth Circuit in this case held, "We are of the opinion that the so-called inferences drawn from other facts were still findings of fact within the meaning of Rule 52 (a), 28 U. S. C. A., as extended to cases from the Tax Court." (at p. 216)

Tenth Circuit

Friend v. Commissioner, 10th Cir., 198 F. 2d 285 (1952) — "It is the well-settled rule that whether property sold or otherwise disposed of by a taxpayer was held by him for sale to customers in the ordinary course of his trade or business, within the meaning of Section 117, is essentially a question of fact." (at page 287) Accord: *Home Co., Inc., v. Commissioner*, 10th Cir., 212 F. 2d 637 (1954); *Di Lisio v. Vidal*, 10th Cir., 233 F. 2d 909 (1956).

The holdings of the Third, Fifth and Seventh Circuits to the contrary follow:

Third Circuit

Curtis Company v. Commissioner, 3rd Cir., 232 F. 2d 167 (1956) — "This sounds like a fact conclusion. But is it subject to reversal if the conclusion is either clearly erroneous or if the findings of fact are induced by an erroneous view of the law," (at page 168).

Philber Equipment Corporation v. Commissioner, 3rd Cir., 237 F. 2d 129 (1956) — "With respect to that finding it must be noted that it was in the nature of an ultimate finding of fact and since such finding is but a legal inference from other facts it is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court, as we recently held in *Curtis Co. v. Commissioner*, 3rd Cir., (1956), 232 F. 2d 167" (at page 131).

Fifth Circuit

Galena Oaks Corporation v. Scofield, 5th Cir., 218 F. 2d 217 (1954) — "Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous rule"' " (citation omitted) (at page 219).

In *Goldberg v. Commissioner*, 5th. Cir., 223 F. 2d 709 (1955) and *Consolidated Naval Stores Company v. Fahs*, 5th Cir., 227 F. 2d 923 (1955), the court expressly reaffirmed its holding in *Galena Oaks Corporation v. Scofield*, *supra*, by quoting the language hereinabove quoted therefrom. Similarly: *Gamble v. Commissioner*, 5th Cir., 242 F. 2d 586 (1957).

Smith v. Commissioner, 232 F. 2d 142 (at page 143) (1956) — The Court indicated its disapproval of the practice of the Tax Court of denominating as a finding of fact its holdings on the "ultimate issue of the case", and again expressly adhered to the views stated in its previous decisions cited.

Seventh Circuit

Chandler v. United States, 7th Cir., 226 F. 2d 403 (1955) — "Though the District Judge made findings of fact, conclusions of law and filed a memorandum, Rule 52, Fed. Rules Civil Proc., 28 U. S. C. A., we are empowered to overturn his decision since the ultimate finding on which the judgment appealed rests is a conclusion of law, or a mixed one" (at page 405). Accord: *Farell v. Jarecki*, 7th Cir., 231 F. 2d 281 (1956).

—o—

Not only is there a clear and unmistakable conflict among the circuits on this important question, but the holdings of the Sixth, Ninth and Tenth Circuits are opposed to this Court's holding in *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481 (1937). In that case the question involved was the applicability of certain non-recognition of gain and loss provisions of the Internal Revenue Code. The Court observed:

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board. [Citation omitted]" (at page 491).

In *Baumgartner v. United States*, 322 U. S. 665 (1944), this Court ruled:

> "Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court" (at page 671).

That this Court regards the correct interpretation of the capital asset definition as involving more than a consideration of whether the findings of fact of the Tax Court or of the District Court were clearly erroneous, is evidenced by the character of the Court's opinion in the capital asset case of *Corn Products Refining Company v. Commissioner*,

350 U. S. 46 (1956), and by the fact that on June 3, 1957 the Court granted the Commissioner certiorari (Docket 921) to the Court of Appeals for the Fifth Circuit in the capital asset case of *Commissioner v. P. G. Lake, Inc.*, 5th Cir., 241 F. 2d 71 (1957).

The Sixth, Ninth and Tenth Circuits' approach to the judicial function in capital asset cases is manifestly different from that of the Third, Fifth and Seventh Circuits. This in and of itself raises an important question which requires resolution by this Court. Review is also justified by the apparent conflict with decisions of this Court in the cited decisions of the Sixth, Ninth and Tenth Circuits on this issue.

II.

IS THE FUNCTION OF THE COURT OF APPEALS DISCHARGED WHEN IT FINDS THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS, IN A CASE WHERE THE JUDGES WHO MADE THE FINDINGS DID NOT HAVE THE OPPORTUNITY EITHER TO SEE OR HEAR THE WITNESSES?

Not only has the Sixth Circuit unduly restricted the scope of judicial review by holding that the question of what is a capital asset is one of fact, but the Court has expressed itself in a way which indicates that it is probably applying an unwarranted standard in determining what is clearly erroneous.

In 1948, Congress amended Section 1141 (a) of the Internal Revenue Code of 1939 to provide that the Courts of Appeal would have jurisdiction to review the decisions of the Tax Court, "* * * in the same manner and to the same extent as decisions of the District Court in civil actions tried without a jury * * *" (Public Law 773, 80th Congress).

In *Miller v. Commissioner*, 6th Cir., 183 F. 2d 246 (1950) Judge McAllister, the judge who signed the order in this case, speaking for the Court, held:

> "Assuredly, this court on review does not weigh the evidence, or pass upon the credibility of the witnesses. Those are the functions of the trier of the facts, and for it alone. It is only when there is no substantial evidence to support the findings and decision, or on errors of law, that a reviewing court may act to set aside a decision of the Tax Court" (at page 252).

We respectfully submit that Judge McAllister's statement is erroneous, and that the same erroneous standard was applied in the consideration of this case. The error of his statement is perhaps best demonstrated by the decision of this Court in *United States v. United States Gypsum Company*, 333 U. S. 364 (1948), where the Court held:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (at page 395).

It is one thing to say that the finding must be affirmed if there is substantial evidence to support it (as was held in the cited 6th Circuit case), and quite another to say that even if there is evidence to support it the reviewing court may still reverse, if after reviewing the entire evidence it "is left with the definite and firm conviction that a mistake has been committed."

The statement by this Court is particularly apposite in a case such as the one at bar where the judges who signed the Tax Court's findings of fact did not see or hear the witnesses, and relied solely on the printed record, and where the one judge who possessed the advantage of hearing and observing the witnesses and who had the first-hand opportunity to form an opinion as to their credibility based upon their demeanor, responsiveness and like intangibles, dissented from the findings of fact of the Tax Court and would have held for the Petitioners (2a, page 15a, *infra*).

Rule 52 (a) provides that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Second Circuit has ruled that a less strict rule of review is applicable where the trial court did not have the advantage of hearing and observing the witnesses. In *Orvis v. Higgins*, 2nd Cir., 180 F. 2d 537 (1950), the Court held:

> "Where the evidence is partly oral, and the balance is written or deals with undisputed facts, then we ignore the trial judge's finding and substitute our own * * * if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance" (at page 539).

Similarly, *Galena Oaks Corporation v. Scofield*, 5th Cir., *supra*:

> "The burden is lighter, much lighter, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous rule' is still applicable" (at page 219).

In this case the findings of the Tax Court were based solely on the written record.

The approach of the Sixth Circuit is contrary to the holdings of the Courts of Appeal for the Second and Fifth Circuits, that where the trial judge's findings are based upon "written evidence", the appellate court may ignore the trial judge's findings and substitute its own *(Orris)*, or that the burden of overcoming them is "lighter, much lighter" *(Galena Oaks)*.

The situation here is similar to that which caused this Court to observe, in *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474 (1951):

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function" (at p. 490).

It is respectfully submitted that the failure of the Sixth Circuit to apply a correct rule of review in this case, and presumably other cases as well, raises an important question with respect to which this Court might appropriately grant certiorari.

III.

MAY THE ACTIVITIES OF AN OWNER OF AN UNDIVIDED INTEREST IN PROPERTY BE IMPUTED TO THE OWNER OF ANOTHER UNDIVIDED INTEREST THEREOF, IN THE DETERMINATION OF THE QUESTION OF WHETHER PROPERTY WAS HELD BY THE TAXPAYER PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF HIS TRADE OR BUSINESS?

The Tax Court in its Opinion held:

> "Anything which Zack or his associates did in promoting the sales of the bomb hoists must also be attributed to each of the others."

This was not a finding of fact. Actually the facts are opposed to it. It was, rather, a statement of an abstract

proposition of law. The Tax Court, however, cited no authority, nor did the Court of Appeals in its order of affirmance.

Despite the form of the Tax Court's statement, the purpose of it was not to attribute to the other co-owners of the bomb hoists the activities of Petitioner, but rather to attribute to Petitioner the activities of Breakstone. The meaning of the Tax Court's ruling was that Breakstone's activities—meager and ineffectual as they were—were to be attributed to Petitioner. The consequence thereof was that while Petitioner clearly was not himself engaged in a trade or business, he was held to be because of the activities of Breakstone which he did not authorize, and of which he was unaware.

In the following cases, the Courts of Appeal of seven circuits held an asset to be a capital asset even though the activities carried on by an agnet of the taxpayer in the sale of the property quite clearly amounted to engagement by the agent in a trade or business: *Reynolds v. Commissioner*, 1st Cir., 155 F. 2d 620 (1946), *Phipps v. Commissioner*, 2nd Cir., 54 F. 2d 469 (1931), *Philber Equipment Corporation v. Commissioner*, 3rd Cir., 237 F. 2d 129 (1956), *Camp v. Murray*, 4th Cir., 226 F. 2d 931 (1955), *Smith v. Dunn*, 5th Cir., 224 F. 2d 353 (1955), *Dillon v. Commissioner*, 8th Cir., 213 F. 2d 218 (1954) and *Fidler v. Commissioner*, 9th Cir., 231 F. 2d 138 (1956).

In *Ross v. Commissioner*, 5th Cir., 227 F. 2d 265, 267 (1955), concerning the sale of lots, the Court rejected the Commissioner's contention that the taxpayer's prior activities in real estate partnerships that functioned largely through other partners, were relevant. The Court characterized the Commissioner's contention as a "* * * postulate presumably that these raised a presumption against [the taxpayer] under some such theory as 'guilt

by association or contamination of his activities in the years in question and with respect to this particular property which had been acquired by the taxpayer from one of those partnerships by what he had been doing in former years; and the frequency and continuity of sales" (at page 260).

In *Greenspon v. Commissioner*, 8th Cir., 229 F. 2d 947, 951 (1956), the taxpayers disposed of over $400,000.00 worth of pipe acquired by them as stockholders of a dissolved corporation. They filed a partnership return. The Court observed: "More than joint ownership of property and desire to liquidate the joint ownership are required to create a partnership" (at page 951).

Surely the fact that the parties labeled their original agreement a "joint venture" agreement is without significance. It is a familiar principle that a witness will not be permitted to testify as to a legal conclusion. The same principle requires that no significance be attached to the label that laymen put on their writings, particularly in a case where the undisputed facts completely negative any relationship of agency. *Smith v. Dunn*, 5th Cir., 224 F. 2d 353, 357 (1955).

The undisputed facts are that the Petitioner never authorized Breakstone to engage in any of his alleged activities, nor was he aware thereof (12a, 36a). Tyroler alone had physical possession of the bomb hoists and it would have been impossible for Breakstone to have delivered any of them on his own initiative (60a). There is nothing in the record to indicate that Breakstone ever communicated to Petitioner any of his alleged activities.

Whether or not the facts being undisputed and there being no finding of fact to the contrary—the Tax Court was correct in stating that the activities of Breakstone

"must also be attributed to each of the others" is clearly a question of law rather than of fact.

The Sixth Circuit's affirmance of the Tax Court's conclusion of law on this point is clearly contrary to the holdings of the other Courts of Appeal. It presents a question on which the Supreme Court might appropriately grant certiorari to resolve the apparent conflict.

IV.

WERE BOMB HOISTS (DESIGNED FOR RAISING AND LOWERING BOMBS TO AND FROM MILITARY AIRCRAFT) FOR WHICH THERE WAS NO MARKET OR CUSTOMER AT THE TIME OF PURCHASE, AND WHICH WERE PURCHASED BY THE PETITIONERS AS A SPECULATION, AND SOLD AT A PRICE OVER SEVEN TIMES THEIR COST MORE THAN TWO YEARS LATER, AFTER A DEMAND THEREFOR HAD ARISEN FOLLOWING THE OUTBREAK OF HOSTILITIES IN KOREA, CAPITAL ASSETS; THE PETITIONERS NEITHER HAVING HIRED ANY SALESMEN NOR SOLICITED ANY CUSTOMER AT ANY TIME, NOR ADVERTISED THE BOMB HOISTS AND THE WHOLE TRANSACTION BEING UNIQUE IN THE LIFE OF THE PETITIONERS?

The Tax Court's Opinion cited only three decisions. They were *Nathan D. Goldberg*, 22 T. C. 533, (1954); *Louis Greenspon*, 23 T. C. 138 (1954); and *Philber Equipment Corporation*, 25 T. C. 88 (1955). Each of these decisions was subsequently reversed on the capital gains issue by the United States Court of Appeal which reviewed them: *Goldberg v. Commissioner*, 5th Cir., 223 F. 2d 709 (1955), *Greenspon v. Commissioner*, 8th Cir., 229 F. 2d 947 (1956), and *Philber Equipment Corporation v. Commissioner*, 3rd Cir., 237 F. 2d 129 (1956).

The Petitioner in his brief called the attention of the Court of Appeals to the fact that each of these cases had been reversed on appeal. In affirming "in accordance"

with the Tax Court's Opinion, the Sixth Circuit has identified itself with an interpretation of the law which is not acceptable to the Courts of Appeal for the Third, Fifth and Eighth Circuits. This conflict between the Circuits is one which, it is respectfully submitted, invites review by the Supreme Court in order to resolve the apparent diversity in approach to this important field of federal taxation.

In *Philber* (3rd Cir.) the taxpayer was in the business of leasing automobiles. At the conclusion of the rental period, it sold them through a sales partnership which was a large scale dealer in automobiles, and the interests in which were identical with the stock holdings in the taxpayer corporation. In the tax year in question 45 vehicles were sold. The Court of Appeals reversed the Tax Court and held the vehicles were capital assets.

In *Greenspon* (8th Cir.), the taxpayers were stockholders of a dissolved corporation which had been engaged in the sale of pipe. They disposed of over $400,000 worth of pipe received on the corporation's dissolution in 138 sales transactions in a two-year period. Many of the purchasers had previously done business with the dissolved corporation. Immediately after the sale of all of the pipe received in dissolution, one of the stockholders organized a corporation, and the husband of the other a second corporation, to engage in the business of selling pipe. The Court of Appeals reversed the Tax Court and held that the sales by the stockholders themselves were sales of capital assets.

In *Goldberg* (5th Cir.), ninety houses were sold by the taxpayer corporation in the year in question, and twenty-one had been sold in the previous three year period. One of the stockholders of the corporation (dissolved prior to suit, and the individual taxpayers being liable as transferees thereof) had "occasionally sold a parcel of real

estate", and the taxpayer's principal activity "* * * was managing property for others, but he occasionally sold properties for others on commission" (at p. 711). The Court of Appeals reversed the Tax Court and held the houses were capital assets.

Not only is the Sixth Circuit's decision opposed to decisions of the Courts of Appeal for the Third, Fifth and Eighth Circuits, but it is also opposed to recent holdings of the Courts of Appeal for the Fourth and Seventh Circuits as well.

In *Camp v. Murray*, 4th Cir., 226 F. 2d 931 (1955), acreage was subdivided, improvements made, and thirty sales were made in the year in question. The district court was reversed and it was held that the lands were capital assets.

In *Chandler v. United States*, 7th Cir., 226 F. 2d 403 (1955), in reversing the district court, the Court of Appeals held that trustees liquidating a long held investment in one million acres of land were entitled to capital gains treatment on the profits realized even though there were at least 536 separate sales transactions extending over an eight year period. The court observed:

> "Had the lands been sold in a single unit there probably would have been slight debate concerning their capital asset status. But the market place is hardly glutted with prospective buyers clamoring for million acre tracts. It seems odd to penalize this taxpayer because it actively sought to dispose of these holdings" (at p. 406).

Accord: *Fahs v. Crawford*, 5th Cir., 161 F. 2d 315 (1947). 95 lots improved by the taxpayer were sold in 1940 and 1941. The Court held the lots were capital assets, and observed:

> "Carrying on a business, however, implies an occupational undertaking to which one *habitually devotes time, attention, or effort with substantial regularity*" (at p. 317) (Italics added).

In *Dunlap v. Oldham Lumber Co.*, 5th Cir., 178 F. 2d 781 (1950), the Court observed:

> "* * * as to the 'business' referred to in the statute, "the word, notwithstanding disguise in spelling and pronounciation, means *business*; it implies that one is kept more or less busy, *that the activity is an occupation*. It need not be one's sole occupation, nor take all of his time.'" (Italics added.) (At p. 784.)

In *Smith v. Commissioner*, 5th Cir., 232 F. 2d 142 (1956), the Court in reversing the Tax Court, rejected the contention that because 117 houses had been sold in a two-year period that the sales were not sales of a capital asset with the statement that "* * * where there is much to sell, there must or may be many sales" (at p. 145).

In this case there was only one purchase, and only four sales over a period of over two years, a lapse of 19 months between the first and second sales, and of over six months between the second and third sales (7a). Over 99.44% of the hoists sold were sold in a three-day period (7a). It is undisputed that there was no activity on the part of the Petitioners with respect to either the purchase or the sales, other than to agree thereto (29a, 35a, 36a). No advertisements were placed or salesmen hired by anybody, or improvements to facilitate sales made (35a, 36a). In the words of the dissenting Tax Court judge: "* * * a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind" (at page 15a *infra*).

The decision of the Sixth Circuit in this case is clearly in conflict with those of the Third, Fourth, Fifth, Seventh, and

Eighth Circuits in cases certainly no stronger for the taxpayer than the Petitioner's.

The Tax Court placed great emphasis on the fact that the bomb hoists were purchased for resale and observed:

> "The only purpose in buying the bomb hoists was to resell them at a higher price. There was no 'investment' such as might be made in other types of property * * *."

Prior to the affirmance by the Sixth Circuit in this case, efforts to inject the notion that the purpose to resell at a profit might have a bearing on the matter had been rejected by the Courts of Appeal for the Second, Seventh and Ninth Circuits.

In *512 West Fifty-Sixth Street Corporation v. Commissioner*, 2nd Cir., 151 F. 2d 942 (1945), it was conceded that the property was "held primarily for sale" (at page 944).

In *Phipps v. Commissioner*, 2nd Cir., 54 F. 2d 469 (1931), the property was purchased "* * * with the expectation of selling it when a good price [was] offered * * *" (at page 471).

In *Beck v. Commissioner*, 7th Cir., 179 F. 2d 688 (1950), the Court observed that, "At most, they only endeavored to dispose of the lot at the best available price, and investigated the possibilities for improvement of the real estate" (at page 690).

In *Fidler v. Commissioner*, 9th Cir., 231 F. 2d 138, (1956), the Court of Appeals relied on the following quotation from the Tax Court's Opinion:

> He made an investment in the literary properties with the hope or expectation of selling them at a profit" (at p. 144).

The Tax Court in its Opinion, *James F. Fisher*, 20 T. C. 1081 (1953), observed that: "* * * He [the taxpayer] may have held them for sale, but not 'primarily for sale to customers in the ordinary course of his trade or business'" (at page 1094).

It is clear that the fact that the taxpayer holds the property for sale—even for sale at a profit—has no bearing on the question of whether he holds it "primarily for sale to customers in the ordinary course of his trade or business." This rule of law is entirely consistent with the Internal Revenue Regulations which provide:

> "In determining whether property is a 'capital asset', the period for which held is immaterial." *Internal Revenue Regulation 111*, Sec. 29.117-1.

The Sixth Circuit's affirmance of the Tax Court on this point is contrary to the regulation and the decisions of the Second, Seventh and Ninth Circuits.

* * * * *

The Tax Court's view that because the bomb hoists were not income-producing property, "there was no 'investment' such as might be made in other types of property"[2] is not relevant. In affirming the Tax Court on this point, the Sixth Circuit has again in a *per curiam* opinion affirmed a Tax Court Opinion making this erroneous statement. See *Dunitz v. Commissioner*, 6th Cir., 167 F. 2d 223 (1948)[2].

It is not difficult to bring to mind numerous examples of property which are not income-producing but nevertheless frequently constitute a capital asset in the hands of the holders thereof. In *Reynolds v. Commissioner*, 1st Cir.,

---

[2] In HARRY DUNITZ, 7 T. C. 672, 684, the Tax Court held that "it is obvious that the bonds were neither purchased nor held as an investment" because they did not produce income.

155 F. 2d 620 1946) the First Circuit held that jewelry was a capital asset. In *Phipps v. Commissioner*, *supra*, the Second Circuit held that vacant land was a capital asset; as did the Fifth Circuit in *Fahs v. Crawford*, *supra*, and *Ross v. Commissioner*, *supra*. In *Greenspon*, *supra*, the Eighth Circuit held that pipe was a capital asset. In affirming the Tax Court on this point, in accordance with its opinion, the Sixth Circuit is in conflict with other Circuits.

* * * * * *

The dissenting Tax Court judge who heard and saw the witnesses found:

> "There was no market for the bomb hoists involved. They were designed and useful only for the specialized purpose of hoisting bombs into the bomb bays of military aircraft.".

The dissenting judge in the Court of Appeals dissented "for the reasons expressed in Judge Withey's dissenting opinion in the Tax Court:"

The Tax Court majority made no findings of fact contrary to those of its dissenting judge. Nor could it properly have done so. The record is manifest that there was no market for bomb hoists; obviously if Breakstone had had customers for the bomb hoists, it would not have been necessary to share his deal with Tyroler and the Petitioner. The bomb hoists had been declared surplus, and the entire record establishes that before the outbreak of hostilities in Korea no one had any use for the bomb hoists.

If, in the spring or early summer of 1950, the owners had thought at all of their investment in the bomb hoists, they must have reflected on the folly that induced them to invest good money in such worthless articles. At that time they did not know whether they would even recover their

investment, let alone make a profit thereon. Their entire experience with the bomb hoists up to that point was opposed to any expectation that the transaction would prove profitable. At that time they did not know anyone who would buy a bomb hoist.

The legislative history of the capital asset provisions demonstrates, beyond peradventure of a doubt, that Congress intended that even if a taxpayer is engaged in business he shall nevertheless be entitled to or subjected to capital gain and capital loss treatment unless he holds the article for sale "to customers" in the "ordinary course" of such trade or business. *George R. Kemon*, 16 T. C. 1026, 1032 (1951); *Thomas E. Wood*, 16 T. C. 213, 219 (1951); *Frank B. Polacheck*, 22 T. C. 858, 862 (1954).

In determining whether or not a taxpayer is a dealer or a trader or speculator the merchant analogy has been employed. *George R. Kemon*, et al., 16 T. C. 1026, 1033 (1951). Merchants have customers and traders or speculators do not.

> "The element of resale *to customers*—i.e. people who regularly or repeatedly deal with them—necessitates both possession of the thing to be sold and customers to sell it to." (Emphasized by the Court.) *Schlafer v. Helvering*, Ct. App. C. C. 83 F. 2d 317 (at p. 319) (1936) aff'd 299 U. S. 171, 174 (1936).

In the recent case of *Farrell v. Jarecki*, 7th Cir., 231 F. 2d 281 (1956), certiorari denied 352 U. S. 830, the Court of Appeals held that the sales by the taxpayer of commodity futures, the taxpayer in one year having engaged in over 10,000 transactions, were nevertheless sales of capital assets because the sales were not to customers within the meaning of the capital asset definition. The Court observed:

> "Just as any other possessor of a capital asset, Farrell owned property there a claim or contract right) but these commodity futures were held by him primarily for price fluctuations—the buying and selling followed" (at p. 288).

So in the case at bar. The gain realized by the Petitioner was not due to his or anyone else's efforts, but rather to a sharp and unexpected rise in the value of the article itself, caused by the outbreak of war. It seems most incongruous to say that an article that cannot be sold, and for which there was no market, was nevertheless held for resale "to customers in the ordinary course of a trade or business." The Petitioner purchased the bomb hoists as a flyer because they cost $330.00 to build, and could be purchased for $17.00 apiece (26a, 38a). The speculative investment by the Petitioner in an article as unusual as are bomb hoists was a unique transaction in his life, and the gain realized by him was not due to any activity on his or anyone else's part.

* * * * *

The Sixth Circuit's decision is also contrary to this Court's holding in *Corn Products Refining Company, supra.* In that case this Court held:

> "The preferential treatment provided by §117 applies to transactions in property which are not the normal source of business income" (at p. 52).

Surely the gain realized by the Petitioner in a once-in-a-lifetime transaction on the sale of bomb hoists, due to a rise in the value of the article itself, it not "the normal source of business income."

It is respectfully submitted that the Sixth Circuit's decision is clearly opposed to the decisions of other Circuits on all the points that are involved in this case, as well as

to this Court's holding in *Corn Products Refining Company*, and that this diversity in approach by the Sixth Circuit to capital asset cases justifies this Court in granting certiorari to resolve the conflict.

On June 3, 1957, certiorari was granted the Commissioner (Docket 921) to review the decision in *Commissioner v. P. G. Lake, Inc.*, Fifth Cir., 241 F. 2d 71, presenting the question whether limited overriding oil payments carved out of leaseholds or working interests are capital assets. It is most respectfully submitted that the case at bar presents another aspect of the correct interpretation of the capital asset definition—one which could appropriately be considered together with *P. G. Lake, Inc.*

CONCLUSION

The Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES L. LEVIN,
Attorney for Petitioners,
1250 Penobscot Building,
Detroit 26, Michigan.

Of Counsel:

MORRIS GARVETT,
1250 Penobscot Building,
Detroit 26, Michigan.

APPENDIX A

INTERNAL REVENUE CODE OF 1939

Sec. 117. Capital Gains and Losses.

(a) Definitions.—As used in this chapter—

(1) Capital Assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * * *

(2) Short-Term Capital Gain.—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;

(3) Short-Term Capital Loss.—The term "short-term capital loss," means loss from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such loss is taken into account in computing net income;

(No changes in substance were made in the reenactment of the foregoing in sections 1221 and 1222 of the Internal Revenue Code of 1954.)

* * * * *

———o———

INTERNAL REVENUE CODE OF 1954

Sec. 7482. Courts of Review.

(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * * *

(c) *Powers.*—

(1) To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

* * * * *

—o—

FEDERAL RULES OF CIVIL PROCEDURE

"Rule 52. Findings by the Court

(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

—o—

REVISED RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RULE 22

PETITION FOR REHEARING

(f) *Time.* A petition for rehearing may be filed within twenty days after judgment is entered, unless the court or a judge thereof grants further time upon a motion filed within such twenty days.

* * * * *

———o———

APPENDIX B

No. 12,953

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Morris W. Zack and Sarah Zack,
Petitioners and Appellants,
v.
Commissioner of Internal Revenue,
Respondent and Appellee.

ORDER

(Filed March 19, 1957)

Before Allen, McAllister and Stewart, Circuit Judges.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and it appearing that the findings of fact, opinion and decision of the Tax Court were not clearly erroneous; and the court being duly advised,

Now therefore, it is ordered, adjudged and decreed that the decision herein reviewed be and is hereby affirmed, in accordance with the findings of fact and opinion of the Tax Court.

Judge Stewart dissents for the reasons expressed in Judge Withey's dissenting opinion in the Tax Court. 25 T. C. 676, 681.

Approved for entry:

/s/ Thomas F. McAllister,
United States Circuit Judge.

No. 12,953

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Morris W. Zack and Sarah Zack,
Appellants,

v.

Commissioner of Internal Revenue,
Appellee.

ORDER

(Filed March 26, 1957)

Before Allen, McAllister and Stewart, Circuit Judges.

The petition for rehearing is denied.

Judge Stewart is of the opinion that the petition for rehearing should be granted.

Approved for entry:

/s/ Thomas F. McAllister,
United States Circuit Judge.

OPINION OF THE TAX COURT OF THE UNITED STATES

(25 T. C. 676)

Morris W. Zack and Sarah Zack, Petitioners v. Commissioner of Internal Revenue, Respondent.

Docket No. 52987.

(Filed December 30, 1955)

Morris Garvett, Esq., and Charles L. Levin, Esq., for the petitioner; Peter K. Nevitt, Esq., for the respondent.

The Commissioner determined a deficiency of $26,036.68 in the income tax of the petitioners for 1950. The issues for decision are (1) whether the petitioners are taxable on one-third or only two-fifteenths of the income realized in 1950 from the sale of certain bomb hoists, and (2) whether that income was taxable as ordinary income from the conduct of a trade or business or as capital gain.

Findings of Fact

The petitioners, husband and wife, filed a joint Federal income tax return for 1950 with the collector of internal revenue for the district of Michigan. Morris W. Zack is sometimes hereinafter referred to as Zack.

Sam Breakstone of Cleveland, Ohio, and H. J. Johnson Company entered into an agreement on March 20, 1948, by which the latter agreed to sell to Breakstone 1,565 electric bomb hoists at $15 each, f.o.b. Columbus, Ohio. The bomb hoists had been manufactured for use by the Armed Forces and after the conclusion of World War II had been declared to be surplus. Breakstone made a down-payment of $1,000 at the time of entering into the agree-

ment and was required to make additional payments of $1,000 each at intervals extending over a period to end about July 1948. Breakstone was to receive shipments of additional hoists as he met later payments. Breakstone had paid $5,000.00 on the contract by April 30, 1948.

Breakstone had been conducting a store in Cleveland in which he sold mostly ball bearings and roller bearings and some other mechanical items. He displayed some of the bomb hoists in his store but never had any calls for the sale of any of them. He also had printed and distributed brochures illustrating and describing the hoists and bearing his name as "Factory Distributor," and his address and telephone number.

Breakstone began to have financial difficulties shortly after he entered into the agreement of March 20, 1948, and was unable to complete the payments for the bomb hoists. He offered on April 12, 1948, to sell an interest in the hoists to J. H. Tyroler of Cleveland, Ohio, who was connected with Tyroler Metals, Inc. Tyroler called his friend Zack, who was president of M. W. Zack Metal Company in Detroit, and told him of Breakstone's purchase of the hoists, of his inability to complete the payments therefor and that Tyroler Metals, Inc., was not interested in purchasing the hoists but he would be willing to advance one half of the money required to complete the payments if Zack would advance the other half so that each of the three, Breakstone, Tyroler, and Zack, would be the owner of one-third interest in the hoists. Zack replied that the M. W. Zack Metal Company would not take any interest in the hoists, but he, his two sons, and his son-in-law would take a one-third interest on the terms proposed by Tyroler. The two sons and the son-in-law agreed orally with Zack that each would take 20% of a one-third interest and would pay 20 percent of the amount required to be paid with re-

spect to a one-third interest and Zack would take the remaining 40 per cent.

Breakstone and Tyroler came to Zack's office in Detroit on April 13, 1948. Zack informed Breakstone and Tyroler that his sons and son-in-law would participate with him in a one-third interest and Breakstone, Tyroler, and Zack signed an instrument reading in part as follows:

> This transaction is as a result of a purchase made by Mr. Sam Breakstone of 648 Huron Road, Cleveland 15, Ohio, from the H. J. Johnson Co., 38 E. Spring Street, Columbus 15, Ohio, for approximately one thousand five hundred sixty-five (1565) * * * electric hoists, * * * at the price of $15.00 each, F.O.B. cars or truck, Columbus, Ohio.
>
> In consideration of Mr. Breakstone's purchase, he is to advance $3500.00, or not less than $2000.00 for this purchase. The balance is to be paid by Mr. J. H. Tyroler, 5305 Sweeney Avenue, Cleveland 4, Ohio, and Mr. M. W. Zack, 2130 Howard Street, Detroit 16, Michigan.
>
> It is agreed between Mr. Breakstone, Mr. Tyroler, and Mr. Zack, that all profits and losses are to be equally divided. It is also agreed that whoever has the opportunity to make the sale of the above-mentioned material, should contact the other two parties of this agreement and notify them of the proposition for the sale.
>
> It is also agreed that in the event the electric hoists have to be converted from D.C. to A.C., the cost for same will be paid by Mr. Tyroler and Mr. Zack.
>
> In case of a partial sale, it is agreed that the monies derived from said sale will apply against the advance made by Mr. Tyroler and Mr. Zack.

> In the event that the hoists have to be moved from Columbus, Ohio, to Cleveland, Ohio, or Detroit, Michigan, said hoists should be sent to Cleveland in the name of Mr. Tyroler, and to Detroit in the name of Mr. Zack.

Zack then gave Tyroler a check for $15,000 to be applied on the purchase price of the hoists. No part of this amount was furnished by Zack's sons or his son-in-law although each offered to pay his share. Each authorized Zack to approve the sales of the hoists without prior consultation with them and agreed that they would pay Zack on demand for the cost of their participations in a one-third interest in the hoists. Zack never made any demand upon them for payment. Zack thereafter approved sales of the hoists as occasions arose. However, he consulted with one of his sons on one occasion prior to approving the sale then involved.

Johnson Company on April 30, 1948, entered into an agreement with Breakstone, Tyroler, and Zack which was supplementary to the agreement of March 20, 1948. Johnson Company, under the new agreement, accepted $16,000 in addition to the $5,000 theretofore paid as payment in full for the hoists. The total number of hoists delivered to Breakstone, Tyroler, and Zack under the agreement was 1,499, resulting in a cost of approximately $14 per hoist.

Breakstone continued his efforts, as before, to sell the hoists. He displayed the bomb hoists in his store, and contacted prospective customers through letters and calls in person. He continued to distribute the brochures and otherwise attempted to sell the hoists until practically all of them had been sold.

Breakstone purchased the hoists for resale and Tyroler and Zack acquired interests in the hoists with a view to the

immediate resale of the hoists. Zack never solicited any one to purchase the hoists but informed salesmen of the M. W. Zack Metal Company in New York City about the hoists and requested them to telephone him if they ran into any purchasers for them. They were furnished with sales literature by Breakstone.

Four hoists were sold as samples to Gimbel Bros. at $65 each on June 18, 1948, and one was shipped to each of its stores in New York City, Philadelphia, Pittsburgh, and Milwaukee. $257.40 was received from the sale of the hoists. Gimbel Bros. made no further purchases of the hoists.

The other sales of the hoists were made as follows:

Date of Sale	Purchaser	No. Sold	Total Selling Price
Feb. 15, 1950	Taylor Machine Co., Cleveland, Ohio.	4	$ 234
Sept. 8, 1950	McGrath & Company, St. Paul, Minn.	200	20,000
Sept. 11, 1950	Parkersburg Junk Co. Parkersburg, W. Va.	1,275	127,500
Total		1,479	$147,734

The remaining 16 hoists were abandoned during 1950.

Breakstone procured Gimbel Bros., Taylor Machine Co., and Parkersburg Junk Co. as purchasers of the hoists sold to them and furnished the name of McGrath and Company to Tyroler as a prospective purchaser of hoists. The sale was made through Tyroler.

Breakstone sold his one-third interest in the hoists to Tyroler on September 11, 1950, and also his interest in the contract with Parkersburg Junk Co. for the sale of hoists to it.

Zack owned about 67 per cent of the stock of M. W. Zack Metal Company and was its president. His sons, Eugene M. and Samuel N. Zack, owned about 11 per cent and 9 per cent, respectively, of the corporation's stock and were vice president and treasurer, respectively. The remainder of the stock was owned by Zack's wife and grandchildren. Zack's son-in-law, Carl Schram, was assistant secretary and assistant treasurer of the corporation.

Zack's two sons and his son-in-law each received $8,000 from Tyroler on October 17, 1950, with the explanation that the amount "is your profit on the hoists deal." Zack was reimbursed for the advance made by him for the cost of the hoists so that he, his two sons, and his son-in-law equally shared the cost of the Zack interest in the hoists.

The petitioners reported for 1950 a long-term capital gain of $7,797.48 on the sale of the bomb hoists while their sons and son-in-law reported long-term capital gains of $4,000 each.

The Commissioner, in determining the deficiency, held that the transaction involving the bomb hoists was a joint venture between Breakstone, Tyroler, and Zack; the two sons and son-in-law were not members of the joint venture; and one-third of the earnings of the venture was taxable to Zack as ordinary income from the conduct of a trade or business.

The two sons and son-in-law of Zack each acquired a 20 per cent interest in a one-third interest in the 1,499 bomb hoists involved herein and continued to be the owners of such interests until the sale or abandonment of the hoists.

Zack and his associates held the bomb hoists for sale to customers in the ordinary course of their trade or business.

All facts stipulated are incorporated herein by this reference.

OPINION

Murdock, Judge: The Commissioner takes the position that the arrangement between Zack, his two sons, and his son-in-law, whereby they were to share in the one-third interest in the bomb hoists here involved on a 40-20-20-20 percentage basis, was a sham and, accordingly, he has taxed one-third of the profits from the sale of the hoists to the petitioners as ordinary income from a trade or business. Zack's sons and his son-in-law each acquired a 20 per cent interest in the bomb hoists in 1948 and continued to hold such interests until the sale or abandonment of the hoists. The agreement between Zack, his sons, and his son-in-law, as might be expected, lacked most of the formalization that such an agreement would have between parties who were not so closely related by family and business activity. But the evidence shows that they agreed to share the undertaking and they carried out that agreement, as the receipt of the cash distribution of their respective share verifies. The Commissioner erred by including the sons' and son-in-law's shares of the profit from the sales of the bomb hoists in the income of the petitioners.

The Commissioner's further position is that the income derived from the sale of the bomb hoists constituted ordinary income, instead of long-term capital gains as reported by the petitioners. His position is that transactions involving the bomb hoists resulted in the sales of other than capital assets within the provisions of section 117 (a)(1), Internal Revenue Code of 1939, because they

were property held by Zack and his associates primarily for sale to customers in the ordinary course of their trade or business.

The purchase and sale of the hoists was not a part of any other business regularly carried on by Zack, but it has long been recognized that a taxpayer may be engaged in several businesses. The question is whether Zack and his associates were selling the bomb hoists in the ordinary course of a business carried on by them. The only purpose in buying the bomb hoists was to resell them at a higher price. There was no "investment" such as might be made in other types of property, but on the contrary there was a general public offering and sales in such a manner that the exclusion of the statute cannot be denied.

Anything which Zack or his associates did in promoting the sales of the bomb hoists must also be attributed to each of the others. Breakstone displayed the hoists, printed and distributed a quantity of brochures illustrating and describing the hoists, wrote letters to and personally contacted potential customers, and continued this until practically all the hoists were sold. Likewise, Zack had his salesmen, who had been furnished with the brochures, looking for customers, and Tyroler was active in working with Breakstone and negotiating sales. The activities amounted to the carrying on of a business of selling the bomb hoists and the sales were to customers in the ordinary course of that business. The sales were not of capital assets. Cf. *Nathan D. Goldberg*, 22 T. C. 533; *Louis Greenspon*, 23 T. C. 138; and *Philber Equipment Corporation*, 25 T. C. 88.

Reviewed by the Court.

Decision will be entered under Rule 50.

Withey, J., dissenting: I must dissent from the majority opinion in this case for the reason that under the facts found there is not the continuity of sales necessary for the conduct of a business within the meaning of section 117 (a)(1) of the Internal Revenue Code of 1939. In support of its decision, the majority has cited *Nathan D. Goldberg*, 22 T. C. 533; *Louis Greenspon*, 23 T. C. 138; and *Philbet Equipment Corporation*, 25 T. C. 88. These cases as a matter of fact by corollary are authority for the opposite conclusion. In *Nathan D. Goldberg, supra*, ninety separate sales transactions of houses were consummated in 1946. In the area where the sales were made there was a heavy demand for houses; there was a ready market. In *Louis Greenspon, supra*, 138 sales transactions involving metal piping were carried on during the 2 years at issue. Sales were made to customers who were the ultimate users of such pipe and who comprised the customer list of a corporation with whom petitioner had been identified. In *Philbet Equipment Corporation, supra*, petitioner, through a used car dealer, during the fiscal year there involved sold 40 motor vehicles. The existence of customers constituting a ready market for used cars should be judicially noticed. In the case at bar, but four sales transactions took place between June 18, 1948, and September 11, 1950. There was no market for the bomb hoists involved. They were designed and useful only for the specialized purpose of hoisting bombs into the bomb bays of military aircraft. Petitioner individually made no sales of the hoists, secured no customers for them, employed no sales force, maintained no inventory of the hoists, nor any independent business office in connection with their sale. In fact, a more passive attitude toward sales than that exhibited by petitioners cannot readily be called to mind. See *Thomas E. Wood*, 16 T. C. 213; *George R. Kroon*, 16 T. C. 1026; *Stern Brothers & Co.*, 16 T. C. 295.